

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6905

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ARCHIE ALLEN,

Petitioner,

- v -

THE STATE OF SOUTH CAROLINA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF SOUTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina entered February 11, 1976.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at 222 S.E.2d 287 (1976) and is set out as Appendix A hereto, pp. 1a-5a infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1256(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United

States.

The time within which a petition for certiorari might be filed was extended to June 10, 1976 by order of Chief Justice Burger, dated April 19, 1976.

QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the laws of South Carolina violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of South Carolina law:

S.C. Code Ann. §16-51 (1962)

Murder defined. -- "Murder" is the killing of any person with malice aforethought, either express or implied.

S.C. Code Ann. §16-52 (1975 Supp.)

Punishment for murder. -- Whoever is guilty of murder under the following circumstances shall suffer the penalty of death:

(1) Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.

(2) Murder committed for hire based on some consideration of value.

(3) Murder of a law-enforcement officer or correctional officer while acting in the line of duty.

(4) The person convicted of committing the murder had previously been convicted of murder, or was convicted of committing more than one murder.

(5) Murder that is willful, deliberate and premeditated.

Whoever is guilty of murder under any other circumstance shall suffer the penalty of life imprisonment. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

S.C. Code Ann. §55-373 (1962)

Capital punishment to be by electrocution. -- All persons convicted of capital crime and having imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the institution of the Department of Corrections at Columbia under the direction of the Commissioner of the prison system instead of by hanging.

STATEMENT

Petitioner was jointly tried with Sam Todd in the General Sessions Court for the Fifteenth Judicial Circuit, in and for Horry County, South Carolina, upon an indictment which charged, in separate counts, the capital crime of murder of a law enforcement officer while in the performance of his duty and the non-capital crime of murder with malice aforethought (T. 1a-2a). Each surviving witness to the crime testified at trial. Certain background testimony was uncontroverted. Petitioner, a 65 year old (T. 201) white man, was deer hunting on the day of the crime with his brother, Cleve Allen, age 53 (T. 73) and Sam Todd, age 33 (T. 147). (T. 74, 147, 202.) Each of the Allens was driving a pickup truck; Todd was driving a car. (T. 34, 74.) All three had been drinking. (T. 197.) At approximately 11:00 am, Floyd Benton and Charles McNeill, uniformed (T. 18, 77), on duty (T. 17, 181) South Carolina game wardens had an amicable encounter with the three hunters. (T. 20-23, 76-78, 203.) Subsequently, Sam Todd cut a cable which blocked entry to a game management area, and he and Cleve Allen entered the area in Cleve Allen's truck. (T. 82, 160-161.) While Sam Todd and Cleve Allen were in the game management area, they were stopped by wardens Benton and McNeill who gave them tickets and arranged an appearance before the local magistrate that afternoon. (T. 31-32, 84-85, 150-151.) Warden Benton and Cleve Allen testified that there was no argument or trouble at this time. (T. 32, 98); Sam Todd testified that the four men did not "have any words at that time" "... other than Cleve asking him - Cleve tried to pay him [Warden McNeill], arguing with him and he told him he

couldn't accept the money, he would have to go before the Magistrate" (T. 150-51). Cleve Allen and Sam Todd then returned to the entrance to the game management area and told petitioner, who was waiting for them there, that they had been given tickets and had to go to town to appear before the magistrate. (T. 90-91, 151, 205-06.) Testimony as to subsequent events differed radically.

Warden Benton testified that after giving out the two tickets he and warden McNeill drove around for "five to seven minutes" (T.33) and then returned to the entrance point to repair the broken cable (T.37). They parked facing the Allen trucks and the Todd car (T. 39), which were parked in a line (T. 37) "seventy-five or eighty feet" away (T. 40). The wardens got out of their car, McNeill on the driver's side and Benton on the right side. (T. 37.) As he was getting out of his truck, Benton "saw Archie Allen get out of his truck with his gun and go around the front of his truck." (T. 37.) He "didn't know anything was wrong or anything" (T. 38), so he "went ahead and laid . . . [his] coat down and laid . . . [his] gun on it, and started to open the trunk to get the wrenches, the pliers" (T. 39). McNeill was "a little back of" him, "about four foot off from the car." (Id.) He then heard McNeill say "'Don't shoot me, Arch, don't shoot me,'" and saw him with his hands outstretched. (T. 40.) Although he knew that McNeill was carrying a gun that day, he did not see it in his outstretched hands. (T. 40-41.) Warden Benton called to Cleve Allen; there was no answer. (T. 41.) He then heard a gun go off "from the direction where Arch was supposed to be" and saw warden McNeill fall to

the ground. (T. 41-42.)<sup>1/</sup> He was unable to see petitioner (T. 41), but could see Cleve Allen and Sam Todd sitting in Cleve Allen's truck at the time the shot was fired (T. 42). He then heard "one of them" -- he did not know which -- say "'there aint but one thing to do now and that's kill the last damn one of these son-of-bitches.'" Sam Todd then went to his car, got his gun (T. 43) and shot warden Benton, causing buck shot wounds (T. 63) which resulted in the loss of one of his eyes (T. 46).

Cleve Allen, testifying as a State's witness, said that when he told his brother that he and Sam Todd had been given tickets petitioner "grabbed his gun out of the truck and said 'The son-of-bitches ought to have their brains blowed out.'" (T. 91.) Cleve Allen got out of his truck to call to the others to stop the impending conflict and saw his brother squat down in front of his truck. (T. 92-93.) At this point warden McNeill "pulled out his gun." (T. 94, 130.) Sam Todd told warden McNeill to put down his gun and then shot him. (T. 94.) Cleve Allen saw Todd fire a second time (T. 95) after which he (Allen) fled (T. 96). At some time before the shooting Cleve Allen heard McNeill tell petitioner to put his gun down. (T. 108.)

Sam Todd testified that when petitioner was told about the tickets he said "'You ought to have killed the sons-of-bitches,'" and then "Arch reached for his gun, and took his gun out of the

<sup>1/</sup> At a pre trial hearing of a motion to sever, the Solicitor stated, on three occasions, that it was the State's theory that Sam Todd had shot both wardens but that the incident had been precipitated by petitioner's words. (T. 286, 290, 291). He noted, however, for the "benefit" of petitioner's trial counsel, that "Floyd Benton will testify that Archie Allen in fact shot Charles McNeill. . . ." (T. 293.)

truck and when he took the gun out he shot Mr. McNeill, and I run from his truck to my car and got my gun out of it." (T. 151.) He admitted shooting Benton and explained prior confessions that he had shot both wardens by testifying that "Arch told me that if I would take it all on myself he had as much as \$20,000.00 or he could getahold of that much and he would be down the next day and get me out of jail." (T. 155.) He explained the fact that police had discovered, with his assistance, two empty shells which he admitted having thrown over nearby bushes by testifying that he had shot a deer from the same spot earlier in the day. (T. 158, 161.) He was using number one buck shot that day (T. 188.), and number one buck shot was taken from the body of warden McNeill (T. 213).

Petitioner's testimony was as follows:

"My connection with them was for me to go get my gun and come down there and leave my truck there and pay the ticket off or do something about it. They said they didn't have nothing to pay with. So I went to the truck. The game wardens were not there at that time. They come up while I was going. I had to reach in because the handle was broke. . . .

All right. I reached in the truck and got my gun - that same gun right there - and let me show you how I had it - and I started, I took about a step back away, stepped about on the shoulder - let me show you how - like this. And when I looked back Charles was on the righthand from me, on the driver's side, and had his pistol out - all the words that were exchanged between me and him, he says, Arch lay your gun down. Well, I thought they had had an argument out on the game management area and there was trouble. Now I will show you how I had the gun. I had the gun just like this - I thought Charles might shoot me, and I walked back like this, facing him around my truck. I set the gun at the righthand front doot - the righthand door of the truck, and I stood there. I heard a blast go off, I didn't know who shot. When I heard that I moved a little back. I was kind of stooped down, a little like this. And in just a short time I heard another shot, and I come around my truck and I got in it,

and I come on out to 501, and when I got in my truck I sort of bent over so if anybody shot at me that maybe they wouldn't hit me. I got on down the road I straightened back up and come on to 501, and I was coming down here to tell the law that something was happening out there, I didn't know what it was. I got to Wolverine Brass and I seen one of my dogs going up the road with Sam's. I turned in behind the dogs and got up then with them across the railroad. I got across the railroad, Cleve come up and the only thing Cleve said to me, he says, that was bad, and he drove off. About that time Sam come up, and he said, ole man they pulled on me and I shot him. That's what Sam said."

(T. 206-07.) He testified that he had been carrying "double ought" shot that day (T. 213) and, on cross examination by the Solicitor, admitted that he had told a detective that when Sam Todd had his gun pointed at warden McNeill, he thought he heard Todd say "don't shoot the old man" (T. 233).

Petitioner's wife testified that she had taken a box of "double ought" shells from his truck the day after the crime (T. 244) and that Sam Todd had confessed to her that he had killed both wardens (T. 246). A sister of the Allens testified that she had overheard Sam Todd telling a detective that he had shot both men and that "Arch and Cleve didn't have nothing to do with it." (T. 248.)

When all sides had rested the solicitor confirmed, at the request of the trial judge, that the indictment excluded premeditated and deliberate murder and that the only capital crime charged was murder of an officer in the course of his duty.

(T. 256-7.) The jury was instructed regarding the crimes of capital murder of an officer, noncapital murder, and voluntary manslaughter in the following terms:

"Murder is the killing of any person with malice aforethought, and this malice may either be express malice or implied malice. So its the killing of any person with malice aforethought either express malice or implied malice. In order to convict a person of murder, the State must not only prove the killing of the deceased by the defendants, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt.

Malice is defined as a term of art, that is, malice is a technical term; malice imports wickedness; malice excludes any just cause of excuse for the act; malice springs from wickedness, from depravity, from a depraved spirit, from a heart which is devoid of social duty and one which is fatally bent on mischief. Malice may be either expressed or implied as I have pointed out to you. These words don't mean different kinds of malice, but the manner in which malice may be shown to exist, that is, either by direct evidence or by indirect evidence or by inference. An example of expressed malice is where there has been some previous threat, or some lying in wait, or where the circumstances shown directly that the intent to kill was entertained. That's express malice. Malice may be implied although there is no expressed intent to kill proven by the direct evidence. It is indirectly and necessarily inferred from the facts and the circumstances which were in fact proven by the evidence. That would be implied malice. And under the law malice is implied or presumed from the willful, the deliberate, the intentional doing of an unlawful act without any just cause of excuse. In other words, generally speaking, means the doing of a wrongful act, intentionally and without any justification or excuse. Now, even if the facts as proven are sufficient to raise a presumption of malice, this would be rebuttable, and its for the jury to determine from all of the evidence whether or not malice has been proven beyond a reasonable doubt.

Malice is presumed or implied from the use of a deadly weapon. However, where the circumstances relating to the death of the deceased are in fact brought out in the evidence, this presumption vanishes and the burden is on the State to prove malice where a deadly weapon is used by evidence which satisfies you on the jury that malice exists beyond a reasonable doubt.

To convict a person of murder there must be malice aforethought, and the law doesn't require that malice shall exist for any particular length of time before the commission of the act, but it must be present before the commission of the act, it must be

aforethought.

So there must be a combination of a previous evil intent and of the act which in fact produces the fatal results, the killing, and this must be proven beyond a reasonable doubt. The State under the law is not required to prove any motive, however, for the killing.

Now, having defined common law murder to you, I will now state to you the punishment for murder as provided by the law of this State at this time.

Section 16-52 of the Code of Laws of this State, as Amended provides that,

"Whoever is guilty of murder under the following circumstances shall suffer the penalty of death."

And this statute goes on and lists five categories of circumstances under which the death penalty is imposed. The circumstance charged in this indictment as count one is the murder of a law enforcement officer while acting in the line of duty. You on the jury will have to make a factual finding in this case; first, whether these defendants, one or both of them are in fact guilty of the crime of murder, and whether it occurred under a circumstance which now under the law of this State requires the imposition of the death penalty. One of these circumstances is the murder of a law enforcement officer, and he must also be acting in the line of duty during the course of the murder.

The law provides further that whoever is guilty of murder under any other circumstance shall suffer the penalty of life imprisonment. So the common law offense of murder, except for the categories set forth in the statute now, the punishment for common law murder is life imprisonment.

I indicated to you that the common law offense of murder also includes the lesser crime of voluntary manslaughter. Manslaughter, that is, voluntary manslaughter is the unlawful killing of another without malice, either express or implied. So it's the absence of malice which distinguishes voluntary manslaughter from murder. Voluntary manslaughter may be further defined as the felonious or the wrongful taking of the life of another intentionally without malice in sudden heat and passion, upon sufficient legal provocation. The law recognizes the fact that sudden heat and passion may for the time being effect (sic) one's self-control, that it may temporarily disturb the sway of reason. And under these circumstances, the law reduces the crime of murder to voluntary manslaughter

where the killing was done in sudden heat and passion if there was sufficient legal provocation for the killing. Sufficient legal provocation must be such as would be calculated to cause a man of ordinary reason and prudence to experience sudden heat and passion and to lose control of himself temporarily. Words alone wouldn't amount to such legal provocation as would justify the taking of a human life. It frequently involves some physical aggression or assault. By way of illustration, if an unjustifiable assault is made with violence on a man's person or circumstances of indignity and the party so assaulted kills the aggressor, the crime would be reduced to voluntary manslaughter if it appears that the assault was committed immediately and that the aggressor was killed in the heat of blood, because to be voluntary manslaughter the killing must be in sudden heat and passion. This crime, voluntary manslaughter, is punishable by a prison term not exceeding thirty (30) years nor less than two (2) years, in the discretion of the Court."

(T.266-70.) It was also instructed that either defendant could be found guilty if the state had proved beyond a reasonable doubt that he had aided, encouraged and abetted the other.

(T. 270.)

Petitioner was found guilty of capital murder (T. 283) and sentenced to "suffer the penalty of death by electrocution" (T. 285). Sam Todd was acquitted. (T.283.)

HOW THE FEDERAL QUESTION WAS RAISED  
AND DECIDED BELOW

On appeal to the Supreme Court of South Carolina, petitioner raised and argued the question "whether . . . [his] sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution." Appellant's Brief, pp. vi, 7-40. Noting that "these issues were neither raised before, nor ruled on by, the trial court," the South Carolina Supreme Court, acting pursuant to its doctrine "in favorem vitae, considered the Appellant's arguments thereon" and in an opinion dated February 11, 1976, found them "to be without merit." State v. Allen, \_\_\_ S.C. \_\_\_, 222 S.E. 2d 287, 291.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAWS OF SOUTH CAROLINA VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Perpetuation of Arbitrary Selectivity Under the New South Carolina Capital Punishment Statutes.

On June 29, 1972, this Court held that the death penalty could no longer be imposed under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Then existing laws of South Carolina, whereby juries had absolute discretion to effect a sentence of life or death in any murder case -- there was and

is in South Carolina only one degree of murder, defined as "the killing of any person with malice aforethought, either express or implied" (16 S.C. Code Ann. §51 (1962)) -- were thereby invalidated. Atkinson v. South Carolina, 408 U.S. 936 (1972); Fuller v. South Carolina, 408 U.S. 937 (1972); State v. Gibson, 259 S.C. 459, 192 S.E. 2d 720 (1972); State v. Bellue, 259 S.C. 487, 193 S.E.2d 121 (1972).

In the wake of Furman, the South Carolina legislature left its definition of murder intact, but amended that provision which had enabled juries to recommend sentences of life or death to provide that the penalty for murder would be death if the murder was committed during the commission of particular crimes, committed for hire or profit, committed against a law enforcement official in the performance of his or her duties, committed by one who had previously been convicted of murder, or if the murder was "willful, deliberate and premeditated." S.C. Code Ann. §16-52 (1975 Supp.). Other murders are punishable by life imprisonment, ibid., and killings without malice remain characterized as manslaughter and punishable by terms of imprisonment ranging from two to thirty years, unless there is a finding that the killing was involuntary, in which case the maximum punishment is imprisonment for three years, S.C. Code Ann. §16-55 (1962). Petitioner and at least 22 other

<sup>2/</sup> defendants have been condemned under these newly enacted procedures. The question presented here is whether the modifications wrought by the South Carolina legislature are sufficiently substantial to meet the minimum requirement of Furman v. Georgia -- that the most extreme penalty known to contemporary man not be imposed arbitrarily.<sup>3/</sup>

<sup>2/</sup> State v. Allen, Florence County Circuit Court, No. 74-GS-21-100, March 10, 1975; State v. Davis, Dillon County Circuit Court, No. 75-GS-17-13, March 14, 1975; State v. Ingram, Darlington County Circuit Court, No. 75-GS-16-104, April 19, 1975; State v. Thomas, Greenville County Circuit Court, No. 75-GS-23-219, May 7, 1975; State v. McDowell, Horry County Circuit Court, No. 75-GS-26-82, June 5, 1975; State v. Davis, Florence County Circuit Court, No. 75-GS-21-272, June 11, 1975; State v. Rumsey, Greenville County Circuit Court, No. 75-GS-23-861, July 23, 1975; State v. Robinson, Orangeburg County Circuit Court, No. 75-229, September 19, 1975; State v. Hall, Greenville County Circuit Court, Nos. 75-GS-23-1155, 75-GS-23-1156, October 9, 1975; State v. MacPhee, Orangeburg County Circuit Court, No. 75-517, October 30, 1975; State v. Law, Florence County Circuit Court, No. 75-GS-28-150, November 14, 1975; State v. Schneider, Greenville County Circuit Court, Nos. 75-GS-23-1908, 75-GS-23-1723, December 12, 1975; State v. Workman, York County Circuit Court, No. 76-GS-46-80, January 28, 1976; State v. Craven, Florence County Circuit Court, No. 76-GS-21-65, February 23, 1976; State v. Wakefield, Greenville County Circuit Court, Nos. 76-GS-23-2183, 76-GS-23-2184, February 26, 1976; State v. Cason, Charleston County Circuit Court, No. 76-GS-10-217, March 11, 1976; State v. Sauls, Florence County Circuit Court, No. 76-GS-21-349, March 25, 1976; State v. Lawson, Richland County Circuit Court, No. 76-GS-40-849, April 9, 1976; State v. Williams, Greenville County Circuit Court, Nos. 76-GS-23-414, 76-GS-23-415, 76-GS-23-416, April 16, 1976; State v. Dooley, Sumter County Circuit Court, No. 76-GS-43-403, May 14, 1976; State v. Gaskins, Florence County Circuit Court, No. 76-GS-21-472, May 28, 1976; State v. Neeley, Florence County Circuit Court, No. 76-GS-21-551, June 4, 1976.

<sup>3/</sup> The submission in subsection I-B, p. 30, *infra*, draws upon broader aspects of the Furman holding than the minimum requirement stated in the text here. As this subsection I-A, p. 30 *infra*, demonstrates, however, the present case presents a capital procedure which so clearly violates the minimum requirement that the Court need not necessarily consider here those broader aspects.

Once this Court has determined the existence of unconstitutional practices, it has heretofore invalidated subsequent contrivances and evasions which seek to perpetuate such practices in new guises. Cf. Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939). The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, *supra*, at 275. As will be demonstrated *infra*, the statutory modifications of 1974 provide "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, *supra*, 408 U.S. at 313 (Mr. Justice White, concurring).

Implementation of the death sentence authorized by South Carolina law inevitably requires the exercise of a broad range of uncontrolled selective discretion at different stages of the criminal process by prosecuting attorneys, juries, trial judges, and the governor in choosing which defendant will live and which will die in cases where the death penalty is potentially applicable. Language requires that the several practices through which uncontrolled and arbitrary discretion infects the administration of the death penalty under the new law be described separately in the following sub-sections of this brief; but they plainly operate *cumulatively* to produce the kind of extreme uncertainty and unpredictability in capital sentencing that violates Furman's ban.

"There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implicit, that adjudication is in fact a quasi-automatic nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification."

NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966). The result of numerous interrelated arbitrary processes in the administration of the death penalty in South Carolina is exactly the result condemned by Furman: death sentences which are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring). For, as the following subsections demonstrate, each stage of the process involves the exercise of discretion -- guided, in some cases, by standards, however vague, and, in other cases, wholly unregulated. And the exercise of that discretion assures that execution will be a rare event, suffered only by an unfortunate few who miss each of many clear opportunities for a lesser disposition while others, guilty of equally serious crimes are permitted to live.

#### 1. Prosecutorial Charging Discretion

"The Prosecutor [is] the real arbiter of what laws shall be enforced and against whom while the attention of the public is drawn rather to the small percentage of offenders who go through the courts."<sup>4/</sup> "[W]e have to open our eyes to the

<sup>4/</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). Cf. MOLEY, POLITICS AND CRIMINAL PROSECUTION 48 (1929).

reality that justice to individual parties is administered more outside courts than in them [through] . . . discretionary determinations by . . . prosecutors."<sup>5/</sup> The impact of prosecutorial discretion on the administration of criminal justice is enormous

"Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."<sup>6/</sup>

South Carolina law places no limitation upon the solicitor's discretion to seek indictment and/or conviction for any of the several crimes that might be provable against a particular defendant. See, South Carolina Constitution, Art. 5, §20, S. C. Code Ann. §§1-223, 1-237, 1-251 and 17-1. Indeed, in a recent capital trial the solicitor forthrightly said in his closing argument:

"I can stand before you and take the consideration away from you of the death penalty. That comes within my job. I could stand before you right now under the law as I have viewed it and tell you that the State of South Carolina is not asking the death penalty, and you could not give it to him, nor his Honor could not give it to him."<sup>7/</sup>

State v. Allen, Florence County Circuit Court, No. 74-GS-21-100 Transcript of Proceedings, p. 665. The untrammelled freedom of

<sup>5/</sup> Shannon, The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor? 2 NEW MEX. L. REV. 141, 170 (1972).

<sup>6/</sup> Note, Prosecutorial Discretion, 21 DePAUL L. REV. 484, 486 (1971-1972).

<sup>7/</sup> This is clearly a correct interpretation of the law. State v. Charles, \_\_\_, S.C. \_\_\_, 190 S.E. 466 (1937).

the solicitor to decline to charge, or to seek a finding regarding a §16-52 special circumstance will inevitably result in an uncertain and inconsistent selection of defendants to be prosecuted on capital charges.<sup>8/</sup>

Moreover, the distinctions among homicide offenses are so hazily drawn in South Carolina that the solicitor's explicit discretion to select among them is only vaguely informed by legislative guidance as to the range of cases in which the death penalty is appropriate. The haziness of the distinctions is described here because the charging and charge modification choices are the first of several life-death decisions to which they lend justification. Clearly, however, the absence of clear legislative direction enhances the danger that arbitrariness and subjective judgments will infect the plea bargaining process; judicial decisions as to the range of offenses that may be set out for consideration by the jury; and the jury deliberation process.

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<sup>8/</sup> See, MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). Cf. Rosett, Discretion, Severity and Legality in Criminal Justice, 46 SO. CALIF. L. REV. 12, 49, (1972):

"[o]fficials tend to respond to the undue harshness of punishment provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process became exaggerated."

Decision as to the presence or absence of one of the circumstances described in §16-52 is, of course, precluded unless it is determined that a murder was committed -- that the killing was "with malice aforethought." S.C. Code Ann. §16.51. This concept could not be more amorphous. Malice is defined under South Carolina law as

"... hatred and ill-will . . . wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong. Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under circumstances that exclude any legal right to do it."

State v. Fuller, 229 S.C. 439, 93 S.E.2d 463, 466 (1956).

Although malice must be "aforethought,"

"... it need not exist for any appreciable period of time before the commission of the act intended, it may be conceived at the very moment the fatal blow is given."

State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1947). And although South Carolina case law indicates that malice is to be presumed unless the killing was a response to "sufficient provocation," see, e.g., State v. Gardner, 219 S.C. 97, 64 S.E.2d 130, 134 (1951), the atypical exclusion of the concept of provocation from the legislative definition of manslaughter (quoted at p.13, supra) enhances the significance of the diffuse concept of maliciousness and allows unusually vague characterizations of the crime. Jury instructions in the following language have, for example, been upheld by the South Carolina Supreme Court,

"I tell you, if he did it out of a malicious heart, sinful heart, it is murder, and the penalty is death. You might ask yourselves, how are you to determine upon a human heart? That is the province of a jury every day. Just like a surgeon looks at

a sick man's tongue, . . . so jurymen look upon a man's hands and tell what motive prompted his heart. I tell you, if Alexander Bowers struck this blow out of a heart full of sin and malice, that is murder. Whether or not he had that sort of heart, is a matter for you. If you are satisfied that he did have that sort of heart, render a verdict of guilty. If you have reasonable doubt about it, write a verdict of not guilty of murder. If you acquit him of murder, then your next inquiry is, is he guilty of manslaughter? The difference between manslaughter and murder is like the difference between day and night. Manslaughter is, as I told you, where a man strikes out of a hot heart; heart full of passion, full of anger, and yet not full of sin. If he strikes out of that sort of heart, the law denominates it manslaughter, and the penalty is imprisonment for a series of years. That is all I have to say to you, except about the matter of reasonable doubt."

State v. Bowers, 65 S.C. 207, 43 S.E. 656, 657 (1903). See also the cumulative definitions given petitioner's jury, quoted at pp. 9-11 supra.

Indeed, §16-51 is not a definition of a statutory offense in the usual sense, but a directive that the common law definition of murder remain in force. State v. Bowers, supra, 43 S.E. at 658; State v. Wilson, 104 S.C. 351, 89 S.E. 301 (1915); State v. Judge, supra, 38 S.E.2d at 719. A trial judge defining murder and manslaughter is thus not limited by the statutory terms, but may use the common-law definitions of the crimes. State v. Stukes, 73 S.C. 386, 53 S.E. 643, 645 (1905). The history of the development of the common law in England forecasts the manner in which prosecutors, as well as judges and juries, will distinguish common law murder and manslaughter in South Carolina in cases in which a capital disposition is likely in the event that malice is established:

"the loose term 'malice' was used, and then when a particular state of mind came under their notice the Judges called it 'malice' or not, according to their view of the propriety of hanging particular

people."

REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 27 (1953), quoting STEPHEN, DIGEST OF THE CRIMINAL LAW (1877).

The murkiness of the common law concept of malice aforethought allows justification of a manslaughter or murder classification for virtually any homicide offense. The prosecutor is therefore able to choose between a maximum thirty year sentence<sup>9/</sup> and a death sentence in virtually any homicide case,

9/ The severity of the maximum penalty for manslaughter in South Carolina makes the prospect of a manslaughter charge realistic in a greater number of cases than it might be in virtually any other state. Counsel for petitioner have found only one other state in which the penalty for manslaughter is fixed and is equally great, 11 Del. Stat. Ann. §§632, 4204 (1974). In Oklahoma and South Dakota maximum penalties for the crime are not fixed; the minimum penalty is fixed at 4 years; 21 Okla. Stat. Ann. §715 (1951); 22 S.D. Comp. Laws Ann. §16-16 (1969). Compare, 14 Ala. Code Ann. §322 (1958) (1 to 10 years); 11 Alaska Stat. §15.040 (1975 Supp.) (1 to 20 years); 13 Ariz. Rev. Stat. Ann. §457 (1956) (10 year maximum); 41 Ark. Stat. Ann. §§1504, 901 (1976) (1 to 5 years); 8 Calif. Penal Code §193 (West's 1970) (15 year maximum); 18 Col. Rev. Stat. §§ 1-104, 3-104 (1973) (1 to 10 years); Conn. Gen. Stat. Ann. §§53-13 (1971) (15 year maximum); Fla. Stat. Ann. §§782.07, 775.082 (1975) (15 year maximum); 26 Ga. Code Ann. §1102 (1972) (1 to 20 years); 38 Hawaii Rev. Stat. §748-7 (1959) (10 year maximum); 18 Ida. Code Ann. §4007 (1975 Supp.) (10 year maximum); 38 Ill. Stat. Ann. §9-2 (1975 Supp.) (1 to 20 years); 35 Burns Ind. Stat. Ann. §13-4-2 (1975) (2 to 21 years); 35 Iowa Code Ann. §690.10 (1950) (8 year maximum); 21 Kan. Stat. Ann. §§3403, 4501 (1975) (1 to 20 years); Ky. Rev. Stat. Ann. §§ 507.030, 532.020 (1975) (10 to 20 years); 14 La. Stat. Ann. §31 (West's 1974) (25 year maximum); 17 Maine Rev. Stat. Ann. §609.20 (1974) (5 to 10 years); 27 Md. Code Ann. §387 (1971) (10 year maximum); Mass. Ann. Laws, ch. 265, §13 (1976) (20 year maximum); Mich. Comp. Laws §750.321 (1968) (15 year maximum); Minn. Stat. Ann. §609.20 (1964) (15 year maximum); 47 Miss. Code Ann. §97-3-25 (1972) (2 to 20 years maximum); 38 Vernon's Mo. Stat. Ann. §559.140 (1953) (2 to 10 years); 94 Mont. Rev. Code §2508 (1969) (10 year maximum); 28 Neb. Rev. Stat. §403 (1965) (1 to 10 years); 16 Nev. Stat. §200.080 (1973) (10 year maximum); N.H. Rev. Stat. Ann. §§630.2, 651.2 (1975) (15 year maximum); 2A N.J. Stat. Ann. §113-5 (1970) (10 year maximum); N.M. Stat. Ann., §40-A-2-3(a), 40-A-1-6 (1953) (2 to 10 years); N.Y. Penal Law §§70.00, 125.20 (McKinney's 1975) (25 year maximum); N.C. Gen. Stat. §14-18

for most homicides are reasonably classifiable as killings without malice aforethought, and surely any murder deemed to have been committed with malice aforethought might reasonably be classified as "willful, deliberate and premeditated" in the

9/ Continued

(1971) (4 months to 20 years; 5 to 60 years for a second manslaughter conviction; N.D. Cent. Code Ann. §§12.1-16.02, 12.1-32.01 (1975) (10 year maximum); 29 Ohio Rev. Code §§2903.03, 2929.11 (Page's 1975) (5 to 25 years); Oreg. Rev. Stat. §§161.605, 163.118 (1975) (20 year maximum); 18 Purdon's Pa. Stat. Ann. §250.03 (1973) (10 year maximum); R.I. Gen. Laws §11-23-3 (1969) (20 year maximum); 39 Tenn. Code Ann. §2910 (1955) (2 to 10 years); Vernon's Tex. Stat. Ann. Pen. Code §12.33, 19.04 (1974) (2 to 20 years); 16 Utah Code Ann. §30-6 (1953) (1 to 10 years); 13 Vt. Stat. Ann. §2304 (1974) (1 to 15 years); 18 Va. Code Ann. §§2-10, 2-35 (1975) (1 to 10 years); Wash. Rev. Code Ann. §9A.32.060 (1975) (10 year maximum); W. Va. Code §61-2-4 (1966) (1 to 5 years); 45 Wis. Stat. Ann. §940.05 (1958) (10 year maximum); 6 Wyo. Stat. Ann. §508, (1958) (20 year maximum).

The median and mean time served for homicide in the United States between 1965 and 1970 were 58.6 months and 79.3 months, respectively. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1974 485 (1975). See also, THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 57 (1976) in which a presumptive sentence of 10 years imprisonment is recommended for the crime of "premeditated, deliberate killing":

"Though this may seem an extremely low sentence, even when the possible 50 percent increase for aggravating factors is considered, it is congruent with the average term of imprisonment actually served by persons currently convicted of murder in the first degree."

language of subsection 5 of §16-52. <sup>10/</sup> Indeed, cases such as

<sup>10/</sup> It is for this reason that the South Carolina death penalty statute was found unconstitutional by Judge Timmerman in the case of State v. White:

"From the standpoint of the trained lawyer and the experienced judge, this statute is a unique mish-mash of contradictory terms. Since all murder is willful, deliberate and premeditated if you find that the evidence proves the Defendant guilty of murder the death penalty statute as I read it undertakes to place upon you the awesome responsibility of deciding whether the Defendant shall suffer the penalty of life imprisonment or the penalty of death. If the evidence proves the Defendant guilty of murder, you and you alone, under the statute, must decide whether the Defendant is to live or die. Under the statute, you and you alone make that decision by the form of your verdict. If your verdict reads guilty of murder that is willful, deliberate and premeditated, the death statute makes that verdict a verdict of death. But, if your verdict reads guilty of murder and says no more, then your verdict under the death statute would reduce the penalty from death to life imprisonment. That presents another complication. In this connection I charge you that the United States Supreme Court in the case of Furman against the State of Georgia, which was decided on June 29, 1972, held unconstitutional the imposition of the death penalty when the jury has the option of imposing by their sentence either the penalty of death or the penalty of life imprisonment and did on that same day for that same reason vacate the judgment of the Supreme Court of South Carolina in two murder cases insofar as the Supreme Court of South Carolina had left undisturbed the death penalty imposed against Wilson Cornelius Atkinson for murder in Charleston County and against Louis Fuller, Jr. for murder in Abbeville County. Following this mandate of the United States Supreme Court, the Supreme Court of South Carolina reversed its judgment upholding the death penalty and remanded each case to the Circuit Court for the purpose of sentencing each Defendant to life imprisonment under Code Section 16-52 as if the jury had returned a verdict of guilty with a recommendation to mercy which the state at that time provided for. The mandate of the foregoing decisions reduces the penalty for murder under Code Section 16052 in this State from death to life imprisonment whenever the jury has the option of imposing by their verdict for murder the penalty of death or the penalty of life imprisonment. I, therefore, hold that the South Carolina statutory death penalty as it relates to murder as charged in this indictment is unconstitutional and therefore void.

petitioner's, in which the catch-all subsection 5 is not relied upon, see p. 8, supra, serve to highlight both the absolute character of charging discretion and the ambiguities of the total statutory scheme, for the life death decision literally depended upon a determination that a homicide which did not warrant indictment as a willful, deliberate and premeditated killing, was committed with malice aforethought. Surely, this linguistic distinction does not prescribe a difference upon which human life should depend.

## 2. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in South Carolina is the unfettered power of the prosecutor to accept a plea of guilty to a lesser offense from a capitally charged defendant. See, S.C. Code Ann. §17-508, State v. Charles, supra, 183 S.C. 188, 190 S.E. 466 (1937). Exercise of this power undercuts the uniform and regular imposition of the death penalty as effectively as would the practice of consistently charging homicide defendants with noncapital murder or manslaughter. The existence of plea bargaining is pervasive in the criminal justice system: guilty pleas are said to account for up to ninety per cent of all criminal convictions in the nation.<sup>11/</sup> Since homicide cases are likely to take up a great deal of time in preparation and

<sup>10/</sup> Continued

State v. White, No. \_\_\_\_\_, Circuit Court, Eleventh Judicial Circuit, Judge's Charge to the Jury, July 10, 1975 (unnumbered) pp. 7-8.

<sup>11/</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

trial, they are particularly likely to be settled by plea bargaining. The fact that the harshness of a "mandatory" death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error<sup>12/</sup> or that a jury will refuse to return a first degree conviction provides additional incentives for plea bargaining in capital cases.

"'Since time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of a trial which will result in a reversal by an Appellate Court.'<sup>13/</sup>

Moreover, many prosecutors themselves

"declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, unrealistic penalties that legislators have prescribed for certain crimes."<sup>14/</sup>

Indeed, the prosecutor's attitude toward plea bargaining in the case of a capitally charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."<sup>15/</sup>

<sup>12/</sup> "The [South Carolina] Supreme Court, for example, in every appeal involving a capital conviction, has applied a special presumption against the death penalty in the form of its rule in favorem vitae. Derived from the common law it is a principle literally in favor of life and liberty used 'by the Court of this State aforesaid to avert a miscarriage of justice,' and as a 'haven or refuge' from 'grave injustice' [State v. Floyd, 174 S.C. 288, 332, 338, 177 S.E. 375 (1934)]." McDonald, Capital Punishment in South Carolina: The End of an Era, 24 S.C. L. REV. 762 (1972).

<sup>13/</sup> Bedau, DEATH SENTENCES IN NEW JERSEY, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, State v. Faison, No. 5-550-57, Bergen Cty., Cr., Nov. 21, 1958).

<sup>14/</sup> Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 54 (1966).

<sup>15/</sup> BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

In the absence of any regulations which restrict a solicitor's plea bargaining freedom in capital cases, some defendants indicted for capital offenses may escape with sentences less harsh than death as a result of plea negotiations conducted in the unlimited discretion of the solicitor.<sup>16/</sup> Such a practice may be thought necessary and proper, and it is doubtless inevitable, to achieve individualized and humane justice, but the effect is nonetheless to introduce exactly the kind of arbitrary selectivity condemned in Furman.

### 3. Jury Discretion

We have discussed at pp. 17-20 supra, the effective discretion conferred by the language of §§16-51, 16-52 and 16-55 to classify homicides in accordance with the decision maker's view of what penalty disposition is appropriate. Moreover, there is a great likelihood that jurors deciding capital cases will, as the major recent study of the American jury system suggests, find the sentencing distinctions contained in §16-52 "demeaningly trivial compared to the stakes"<sup>17/</sup> and return verdicts consistent only with their subjective views of the

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<sup>16/</sup> Although properly supervised plea bargaining may not violate the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution, see Bradley v. United States, 397 U.S. 742, 750-755 (1970), plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under Furman v. Georgia. It should be noted that the approval of standardless jury sentencing under the Due Process Clause in McGautha v. California, 402 U.S. 183 (1971) did not imply (as the subsequent Furman decision made clear) that such a procedure complied with the Eighth Amendment.

<sup>17/</sup> KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966).

appropriateness of imposition of a death penalty. Life may thus be spared in the event of a murder conviction by the simple device of failing to find that a §16-52 circumstance was present.

The full range of discretionary opportunities is ordinarily available to a South Carolina capital jury. For, in cases brought under §16-51, trial judges are required to charge the offense of manslaughter unless "it . . . very clearly appear[s] that there is no evidence whatever tending to reduce the crime from murder to manslaughter." State v. Norris, 253 S.C. 31, 168 S.E. 2d 564 (1969), at 565, citing State v. Gardner, 219 S.C. 97, 64 S.E.2d 130, see also, State v. Bealin, 201 S.C.490, 23, S.E.2d 746 (1943), and a conviction may be had for involuntary manslaughter<sup>18/</sup> under an indictment for murder in the usual form. State v. White, 475 S.E.2d 712 (1969). Moreover, inconsistency on the part of the jury in finding a defendant guilty only of a lesser offense is not ground for reversal. State v. Abney, 109 S.C. 102, 95 S.E. 179 (1968); State v. Moseley, 133 S.C. 53, 130 S.E. 123 (1925).

It is of course also possible that capital juries will revert to the practice that prevailed in the period before discretionary jury sentencing was permitted in capital cases and return acquittals in those cases (based, perhaps, on some

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<sup>18/</sup> A conviction for involuntary manslaughter is appropriate where the killing was the result of criminal negligence, defined as a "reckless disregard for the safety of other" S.C. Code Ann. §16-55.1 (1974 Supp.)

amorphously defined defense such as insanity).<sup>19/</sup> For, when faced with the enormity of the decision to take life, American juries have refused, and will always refuse, selectively and in accordance with their sympathies and prejudices, to return verdicts which result in mandatory death sentences. See, McGautha v. California, 402 U.S. 183, 199 (1971) and authorities cited herein, Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B.U.L. REV. 32 (1974).

#### 4. Executive Clemency

The Governor of South Carolina has absolute authority to "commute a sentence of death to that of life imprisonment," South Carolina Constitution, Art. 4, §14 (1974 Supp.),<sup>20/</sup> and

<sup>19/</sup> The McNaughten rule remains the test for mental capacity to commit a crime in South Carolina. State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973). The amorphousness of this rule is widely acknowledged; indeed, "[e]very word in this rule, except the prepositions and definite articles, has been problematical." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50 (1974). See, State v. Cannon, *supra*, 197 S.E.2d at 682:

"It should be comforting to those who would attack the McNaughten rule to realize that a layman jury, regardless of the rule recited normally takes a common sense approach and determines whether the accused person is, first guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be excused of the crime. . . ."

<sup>20/</sup> Section 55-641 of the South Carolina Code (1962) provides that

"The Probation, Parole and Pardon Board shall consider all petitions for . . . the commutation of a death sentence to life imprisonment which may be referred to it by the Governor regarding such petitions. The Governor may or may not adopt such recommendations but in case he does not he shall submit his reasons for not doing so to the General Assembly. The Governor may act on such petition without reference to the Board."

is required to "take care that the laws be faithfully executed in mercy," South Carolina Constitution, Art. 4, §12.

Although data is limited, there is evidence that, under a system of capital punishment which does not explicitly empower juries to spare the lives of capital offenders, the commutation power has been broadly exercised to alleviate the harshness of jury verdicts.<sup>21/</sup> One explanation of this phenomenon is that in such a procedural system, the clemency authority rather than the jury becomes the agency which compensates for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. One study has noted:

"In a jurisdiction which provides for the sentence of death unless the jury recommends mercy, the judge being bound by the jury's recommendation to impose a life sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."<sup>22/</sup>

A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary, by definition. It can also be demonstrated that such a system is likely to be

<sup>21/</sup> Bedau, Death Sentences in New Jersey 1907-1960, 19 RUTGERS L. REV. 1, 10 (1964); Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES 165, 166-167 (1957).

<sup>22/</sup> Note, Executive Clemency in Capital Cases, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

discriminatory in effect.<sup>23/</sup>

Since the Governor is not required to act consistently in like cases, and since there is no way to review his clemency decisions for arbitrariness, there will inevitably be a "freakish" sparing of some capital defendants and an equally arbitrary execution of other similarly situated capital defendants. Those defendants actually executed in South Carolina will remain "a capriciously selected random handful." Furman v. Georgia, supra, at 309-310 (Mr. Justice Stewart, concurring).

B. The Excessive Cruelty of the Penalty of Death

We have argued that the laws under which petitioner was sentenced to die fail to preclude arbitrary infliction of the death penalty. This is so because the statutory scheme is thoroughly flexible and because the awesome severity and finality of the punishment of death provide strong incentive to take advantage of that flexibility. For the reasons set forth in Parts III of the Briefs for Petitioners in Fowler v. North Carolina, No. 73-7031 and in Jurek v. Texas, No. 75-5394, petitioner urges that the question whether the statutes under which he was convicted and sentenced are excessively cruel, regressive and inconsistent with contemporary standards of decency merits consideration by this Court.


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<sup>23/</sup> See Wolfgang, Kelly and Nolde, Comparison of the Executed and the Commuted Among Admissions of Death Row, 53 J. CRIM. L. CRIM. & POL. SCI. 301 (1962).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

  
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APPENDIX A.

The STATE, Respondent,

v.

Archie ALLEN, Appellant.

No. 20167.

Supreme Court of South Carolina.

Feb. 11, 1976.

Defendant was convicted before the General Sessions Court, Horry County, Clarence E. Singletary, J., of murder of a law enforcement officer, and defendant appealed. The Supreme Court, Moss, Acting Associate Justice, held that denial of motion for change of venue on basis of pretrial publicity was not an abuse of discretion, that denial of motion for severance and separate trials was not an abuse of discretion, that evidence was sufficient to sustain conviction, that statute, which requires imposition of death penalty under certain circumstances wherein one is found guilty of murder, is not legislation unconstitutionally vesting trial court or jury with discretion in imposing death penalty, and that capital punishment does not violate federal constitutional prohibition against cruel and unusual punishment or state constitutional prohibition against cruel, corporal or unusual punishment.

Affirmed.

1. Criminal Law  $\Rightarrow$  126(2)

Denial of motion for change of venue on basis of pretrial publicity was not an abuse of discretion in prosecution for murder.

during a game warden where the newspaper and magazine articles in question were factual in nature and were not inflammatory or accusatory toward defendant.

2. Criminal Law  $\Rightarrow$  622(1), 1148

Generally, whether to grant motion for severance and separate trials is addressed to discretion of trial judge, and, unless that discretion is abused, his decision will not be disturbed on appeal; such rule applies with equal force when the motion is based on antagonistic defenses.

3. Criminal Law  $\Rightarrow$  622(2)

Denial of motion for severance and separate trials on ground of antagonistic defenses was not an abuse of discretion in murder prosecution in which defendant testified that codefendant shot two game wardens and in which codefendant testified that defendant instigated the trouble and shot one of the wardens.

4. Criminal Law  $\Rightarrow$  935(1)

Whether to grant motion to set aside verdict or, in alternative, grant new trial due to alleged insufficiency of the evidence is addressed to sound discretion of trial court.

5. Criminal Law  $\Rightarrow$  935(1)

In ruling on motions to set aside verdict or, in alternative, grant new trial on basis of alleged insufficiency of the evidence, trial court is concerned with the existence of evidence, not with its weight.

6. Homicide  $\Rightarrow$  250

Evidence, including game warden's testimony that he heard a second warden ask accused not to shoot such warden and that first warden subsequently heard a blast and saw second warden fall, was sufficient to sustain conviction of murder of law enforcement officer.

7. Homicide  $\Rightarrow$  351

Statute, which requires imposition of death penalty under certain circumstances wherein one is found guilty of murder, is

not legislation unconstitutionally vesting trial court or jury with discretion in imposing death penalty. Code 1962,  $\S$  16-52.

8. Criminal Law  $\Rightarrow$  1213

Capital punishment does not violate federal constitutional prohibition against cruel and unusual punishment. Code 1962,  $\S$  16-52; U.S.C.A.Const. Amend. 5, 3, 14.

9. Criminal Law  $\Rightarrow$  1213

Capital punishment does not violate state constitutional prohibition against cruel, corporal or unusual punishment. Code 1962,  $\S$  16-52; Const. art. 1,  $\S$  13.

Franklin R. DeWitt, Conway, and Matthew J. Perry, Columbia, for appellant.

Atty. Gen. Daniel R. McLeod and Asst. Atty. Gen. Joseph R. Barker, Columbia, Sol. J. M. Long, Jr., and Asst. Sol. Jim Dunn, Conway, for respondent.

MOSS, Acting Associate Justice:

Archie Allen, the Appellant, was tried in Horry County before the Honorable Clarence E. Singletary on the charge of murdering one Charles McNeill, a South Carolina Game Warden. The jury returned a verdict of guilty of the murder of a law enforcement officer and the Appellant was sentenced, pursuant to Section 16-52 of the 1962 Code of Laws, to death.

The Appellant contends before this Court that he is entitled to a reversal of his conviction and a new trial. Specifically, he assigns error to the conduct of the trial court in three particulars:

(1) In refusing to grant Appellant's motion for a change of venue;

(2) In refusing to grant Appellant's motion for severance and separate trials; and

(3) In refusing to grant Appellant's motion to set aside the verdict or, in the alternative, for a new trial.

The Appellant also urges that his death sentence must be set aside because of what

he perceives to be constitutional infirmities in Section 16-32.

Appellant's arguments will be considered in detail below. Initially, however, a review of the facts is necessary to an understanding of the issues.

On October 3, 1974, the Appellant, his brother, Cleve Allen, and a friend Sam Todd, were engaged in a deer drive in a rural area of Horry County. At about 11:00 A.M., South Carolina Game Wardens Charles McNeill and Floyd Benton, who were patrolling the area as part of their routine duties, met and conversed for some thirty to forty minutes with the Appellant and his companions.

That afternoon, McNeill and Benton returned to the same area and discovered that a cable, which they had previously placed across the road to keep people out of a nearby game management area, was down. They observed that a vehicle had entered the management area and proceeded to follow it. The vehicle was occupied by Cleve Allen and Sam Todd. The Wardens stopped the vehicle at approximately 2:30 P.M. and Officer McNeill issued both men a ticket. Todd and Allen, followed by the two Wardens, then drove back to the area where the cable was down.

When McNeill and Benton arrived at the cable, the Allen brothers and Todd, their vehicles parked nearby, were still present. The Wardens discovered that the cable was broken and set about repairing it.

Up to this point, the testimony of the four surviving participants of this incident was generally in agreement. Their versions of the subsequent events were, however, widely divergent. The Appellant and his brother, Cleve Allen, testified that Sam Todd shot both Wardens. Todd testified that the Appellant instigated the trouble and shot McNeill. Todd admitted that he shot Benton.

Floyd Benton testified that McNeill stopped their car near the cable and that he took off his coat and gun and began getting the tools to repair the cable. While he was

in the process of getting the tools from the trunk of his car, he observed the Appellant take his gun and walk toward the front of his truck. A few seconds later, Benton heard McNeill say, "Don't shoot me, Arch, don't shoot me." Benton saw McNeill standing a few feet away but could not, due to the positions of the vehicles, see the Appellant. Looking around, Benton observed Cleve Allen and Sam Todd sitting in Cleve's truck. He testified that he called to Cleve in an effort to get the latter to restrain his brother. Benton then heard a blast and saw McNeill fall. He testified that the blast came from the direction in which the Appellant was heading when Benton had last seen him.

Benton further testified that he heard an unidentified voice say, "well, there ain't but one thing to do now and that's kill the last damn one of these sons of bitches." Benton turned to find Sam Todd aiming his shot gun at him. Todd then shot Benton down, seriously wounding him. The three men then drove off.

[1] Immediately prior to trial, Appellant moved for a change of venue on grounds that extensive pre-trial publicity had prejudiced his right to a fair trial. After hearing oral argument and reviewing some six newspaper and magazine articles tendered by the Appellant, Judge Singletary denied the motion. Appellant contends that denial constitutes reversible error.

In *State v. Swilling*, 249 S.C. 541, 155 S.E.2d 607, this Court held that the moving party has the burden of showing that prospective jurors have been prejudiced by pre-trial publicity. Further, we have held that the decision of the trial judge on motions of this nature will not be disturbed in the absence of a showing of abuse of discretion. *State v. Fuller*, 227 S.C. 128, 87 S.E.2d 237.

A review of the record fails to reveal that the trial judge abused his discretion in the instant case.

Appellant's showing in support of his motion was insufficient to carry his burden of

establishing that prospective jurors had been prejudiced by the pre-trial publicity. That showing, as noted above, was limited to some six newspaper and magazine articles. None of these articles were inflammatory or accusatory toward the Appellant and none appeared to be anything but factual in nature.

Furthermore, the trial court followed the procedure approved of in our decision in *State v. Crowe*, 253 S.C. 258, 188 S.E.2d 379, cert. den., 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666, in that he conducted a careful *voir dire* examination of the jurors to determine the existence of any bias or prejudice on their part. The record indicates, in fact, that the trial court propounded every one of the *voir dire* questions requested by the Appellant.

The second issue raised by the Appellant concerns the denial of his motion for severance and separate trials. That motion, made some two days prior to trial, was based upon an allegation that the defenses of the Appellant and his co-defendant, Sam Todd, were antagonistic to each other and that the Appellant would be prejudiced if they were tried together.

[2] Generally speaking, as noted by this Court on numerous occasions, the granting or denial of a motion for severance and separate trials is addressed to the discretion of the trial judge. Unless that discretion is abused, his decision will not be disturbed on appeal. *State v. Holland*, 261 S.C. 438, 201 S.E.2d 118, and see cases collected under C-622(1), and 622(2), West's South Carolina Digest, Criminal Law.

The general rule applies with equal force when, as in the instant case, the motion is based upon antagonistic defenses. *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669.

[3] Clearly, the trial court acted properly within the bounds of its discretion. The facts in *Britt*, *supra*, are strikingly similar. In that case, three men were on trial for the murder of a South Carolina Highway Patrolman. As in the instant case, there

was a dispute among the defendants as to who fired the fatal shot. Two of the defendants moved for severance and separate trials on the grounds of antagonistic defenses. They both denied having fired the fatal shot and one, corroborated by the third defendant, averred that the other did the shooting. The trial court denied the motion and this Court affirmed citing as authority five previous cases in which denials of motions for severance based upon antagonistic defenses had been upheld. *State v. Brown*, 108 S.C. 490, 95 S.E. 61; *State v. Jeffords*, 121 S.C. 443, 114 S.E. 415; *State v. Francis*, 152 S.C. 17, 149 S.E. 348; *State v. Atkins*, 205 S.C. 450, 32 S.E.2d 372; *State v. Mathis*, 174 S.C. 344, 177 S.E. 315.

Appellant advances no reason why these decisions are not controlling and this Court is aware of none. There is no basis for a reversal on this point.

The third issue raised by the Appellant concerns the trial court's denial of his motion to set aside the verdict or, in the alternative, for a new trial. The motion was based upon alleged insufficiency of the evidence.

[4,5] The granting or denial of such motions is addressed to the sound discretion of the trial court. *State v. Quillian*, 263 S.C. 87, 207 S.E.2d 814. Furthermore, in ruling on motions of this nature, the trial court is concerned with the existence of evidence—not with its weight. *State v. Addis*, 237 S.C. 482, 186 S.E.2d 415; *State v. Jordan*, 255 S.C. 36, 177 S.E.2d 464.

[6] Under the facts of the instant case, as reviewed above, the trial court acted properly within its discretion in submitting the factual issues to the jury. Undeniably, there were both direct and circumstantial evidence which reasonably tended to establish the Appellant's guilt. Indeed, the testimony of Floyd Benton alone was sufficient to warrant sending the case to the jury.

The fourth and final issue raised by the Appellant concerns the constitutionality of Section 16-32 of the 1962 Code of Laws.

The Appellant launches three attacks on the constitutionality of this Section. He argues:

(1) That Section 16-52 is unconstitutional under the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346;

(2) That capital punishment is "cruel and unusual punishment" and is therefore unconstitutional *per se* under the Eighth Amendment to the United States Constitution; and

(3) That capital punishment is "cruel, corporal, or unusual punishment" and is therefore unconstitutional *per se* under Article 1, Section 15 of the South Carolina Constitution.

Although these issues were neither raised before, nor ruled on by, the trial court, this Court has, in *favorem vitae* considered the Appellant's arguments thereon. *State v. Swilling*, 249 S.C. 541, 155 S.E.2d 607. We find them to be without merit. They will be discussed *seriatim*.

(7) Appellant contends that Section 16-52 is unconstitutional under the *Furman* decision because imposition of the death penalty pursuant to that section is discretionary and therefore cruel and unusual punishment under the Eighth Amendment to the United States Constitution. He specifically attacks the discretion of the jury, the Solicitor's charging discretion, the Solicitor's plea negotiation discretion, and the Governor's discretion in granting or withholding executive clemency.

The Legislature of this State, in amending Section 16-52, apparently made a conscious, deliberate effort to comply with the mandate of *Furman*. We think that effort was successful.

Although *Furman* is not subject to facile interpretation, both the majority and minority justices of that decision concur that the decision did no more than condemn legislation which vested the trial court or jury with discretion in imposing the death penalty (See Justice Marshall's dissent, joined by

Justices Douglas and Brennan in *Schick v. Arndt*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430, and see the separate dissenting opinions, in *Furman*, of Chief Justice Burger, 408 U.S. 375-376, 398, 92 S.Ct. 2796-2797, 2808, 33 L.Ed.2d 427-428, 441; Justice Blackmun, 408 U.S. 413, 92 S.Ct. 2816, 33 L.Ed.2d 450; and Justice Powell, 408 U.S. 415-418, 92 S.Ct. 2816-2818, 33 L.Ed.2d 451-453).

Section 16-52 allows no such discretion to the trial judge and jury. The statute provides certain specific, narrow, well delineated circumstances in which one who is found guilty of murder must suffer the penalty of death. In compliance with *Furman*, neither the trial judge nor jury is given any discretion in the matter.

Appellant's contentions concerning the discretion of the Solicitors and the Governor are clearly without merit. *Furman* cannot reasonably be read to extend beyond the trial judge and jury or beyond the sentencing state of the proceedings. Section 16-52 has removed the discretion condemned by *Furman*; it is therefore in compliance with that decision.

(8) Appellant's next contention is that capital punishment constitutes "cruel and unusual punishment" and is therefore unconstitutional *per se* under the Eighth Amendment to the United States Constitution.

The decisions of the United States Supreme Court lend absolutely no support to the Appellant's contention. On the contrary, prior to *Furman*, the Court either expressly or implicitly upheld the constitutionality of capital punishment on numerous occasions. *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In Re Kemmler*, 135 U.S. 456, 10 S.Ct. 936, 34 L.Ed. 519 (1890); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 541, 54 L.Ed. 793 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 371, 91 L.Ed. 422 (1946); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Witherspoon v. Illinois*,

391 U.S. 510, 88 S.Ct. 1776, 20 L.Ed.2d 776 (1968); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

Furthermore, as this Court noted in *State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, *Furman* itself cannot be read to declare capital punishment unconstitutional *per se*.

Under the foregoing decisions and under any constitutionally sound interpretation of the Fifth, Eighth, and Fourteenth Amendments, it is clear that capital punishment does not violate the prohibition against cruel and unusual punishment.

(9) Appellant's final contention is that capital punishment constitutes "cruel, corporal, or unusual punishment" and is therefore unconstitutional *per se* under Article 1, Section 15 of the South Carolina Constitution.

This Court considered this issue on no less than four occasions under Article 1, Section 15, the predecessor provision of Article 1, Section 15. On each occasion, the constitutionality of capital punishment was upheld. *State v. Crowe*, 258 S.C. 258, 153 S.E.2d 379; *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111; *State v. Gamble*, 249 S.C. 605, 155 S.E.2d 916; and *Moorer v. MacDougall*, 245 S.C. 633, 142 S.E.2d 46.

The Appellant relies heavily upon the fact that the language of Article 1, Section 15 differs from that of Article 1, Section 19.

The former provision used the words "cruel and unusual punishment." He urges that the specific language of Article 1, Section 15 compels the conclusion that continued imposition of the death penalty is inconsistent with this new provision. We disagree.

The reasoning upon which the foregoing decisions were based is as directly applicable to Article 1, Section 15 as it was to Article 1, Section 19. See *Crowe*, 258 S.C. at 271, 153 S.E.2d at 385. We adhere to those decisions.

As is our custom in cases of this nature, we have, in *favorem vitae*, carefully examined the record for any errors affecting the substantial rights of the accused, even though not made a ground of appeal. We find none. Having concluded that the evidence was sufficient to sustain the verdict, and finding no errors of law in the trial, we are not warranted in disturbing the verdict and sentence imposed.

Affirmed.

LEWIS, C. J., and LITTLEJOHN, NESS and GREGORY, JJ., concur.

